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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT C. HERZFELD, *et al.*,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO AND THE HONORABLE FRED M. WINNER, *et al.*,

Respondents.

ROBERT F. BROWN AND RFB PETROLEUM, INC., a Texas Corporation,

Petitioners,

v.

TRENTON H. PARKER, THE INTERNATIONAL MINING EXCHANGE, INC., a Colorado Corporation, R. STEPHEN SPANGLER, JAMES T. WILSON, ADRIAN DOYLE and ROBERT NORWOOD,

Respondents.

REPLY BRIEF

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REPLY BRIEF

I. THE BRIEF FOR THE UNITED STATES IN OPPOSITION DOES NOT ADDRESS THE MAJOR ISSUES PRESENTED BY THIS APPEAL.

Petitioners request that this Court determine whether a United States District Court may invoke the drastic *civil* equitable remedy of receivership in a criminal proceeding without express statutory authority. The assumption of equitable powers by a District Court in a

criminal proceeding is unprecedented. On the other hand, this Court has held in *Hammock* v. *Farmers Loan and Trust Company*, 105 U.S. 77, 26 L.Ed. 1111 (1882), that a receivership established without express statutory authority is illegal.

The opinion of the Tenth Circuit Court of Appeals creates an unprecedented expansion of Rule 57(b) of the Federal Rules of Criminal Procedure. The opinion denies property to classes of victims without due process of law by allowing a criminal to determine the victims he chooses to repay as part of his plea bargain agreement.

The Brief of the United States attempts to obscure and minimize the importance of the issues presented. The major issues are not addressed. The government merely asserts that restitution of large amounts of money has previously been accomplished. The precedent of this Court, the assumption of equitable powers by a Federal Criminal Court, the vast expansion of Rule 57(b) and the due process ramifications of allowing a criminal to decide which of his victims will receive restitution are ignored.

The Brief of the United States additionally contains substantial inaccuracies. The government charges that legislative history quoted by Petitioners Brown and R.F.B. Petroleum Inc., refers to a provision of the Victim and Witness Protection Act of 1982, which was not enacted. This assertion is erroneous. The legislative history cited by petitioners Brown and R.F.B. Petroleum Inc., specifically refers to 18 U.S.C. § 3579 which became law and is relevant in interpreting the jurisdictional reach intended by Congress. In addition, the government has misconstrued the cases which it has cited in its brief. The cases cited by government do not stand for the proposition that a receivership may be utilized to effect restitution in a criminal action.

The contentions which were raised in the Brief of the United States are addressed hereinbelow.

II. THE GOVERNMENT HAS CITED NO AUTHORITY WHICH SUPPORTS ITS POSITION THAT 18 U.S.C. § 3651 PERMITS A CRIMINAL COURT TO CREATE A RECEIVERSHIP TO EFFECT RESTITUTION.

The government cites several cases[1] in support of its position that the creation of a receivership does not represent a departure from settled practice under 18 U.S.C. § 3651. These cases are cited for the proposition that large amounts of money can be involved in restitution (see footnote 1). Petitioners have no dispute with this assertion. Two cases are also cited for the proposition that a court officer can be appointed to accomplish distribution. In both cases, however, the criminal court deferred to simultaneous civil litigation to determine distribution.

In *United States* v. *Boswell*, 565 F.2d 1338, 1342-1343 (5th Cir.) cert. denied 439 U.S. 819 (1978), the criminal court used a probation officer to hold monies of defrauded investors in trust, with the caveat:

> "The money was to be held under the control of the Court until such time 'as there has been a final determination of this matter,' an event to be anticipated when it became known how much, if anything, the state receiver had recovered for the depositiors from the net proceeds of the receivership."

In *United States* v. *Boswell*, *supra*, a receiver was not appointed by the criminal court to effect restitution under

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[1] *Barringer*, Nos. 82-5017(L) and 82-6159 (4th Cir. June 16, 1983); *United States* v. *Lynch*, 699 F.2d 839, 845-846 (7th Cir. 1982); *United States* v. *Grugette*, 678 F.2d 600, 604 (5th Cir. 1982); *United States* v. *Tiler*, 602 F.2d 30, 33-34 (2d Cir. 1979); and *United States* v. *Boswell*, 565 F.2d 1338, 1342-1343 (5th Cir.) cert. denied, 439 U.S. 819 (1978).

18 U.S.C. § 3651. The receiver was appointed in a civil state action.

In *United States* v. *Roberts*, 619 F.2d 1, 2 (7th Cir. 1979), the second case cited by the government, the receiver was not appointed in the criminal action. Again, the receiver was appointed in a separate civil action. The United States District Court for the District of Colorado correctly found this case to be inapposite. In his Memorandum Opinion And Order of July 26, 1982, Judge Kane stated:

> The plaintiffs in the consolidated actions, 80-K-850 and 80-K-859, argue that there is no inherent power which permits United States District Courts to appoint a receiver in criminal proceedings. No authority has been cited by any party and I can find none which addresses this question. *United States* v. *Roberts*, 619 F.2d 1 (7th Cir. 1979) is suggested, but it is inapposite since the receiver was not appointed by the judge in the criminal case.

Both cases cited by the government involve restitution in which the criminal court deferred to a receivership established by a civil court in a separate civil action.

In *United States* v. *Barringer*, Nos. 82-5017(L) and 82-6159 (4th Cir. June 16, 1983), also cited by the government in its brief, the Court specifically deferred to simultaneous civil litigation for the determination of the claim of an aggrieved party and for the determination of the amount of the claim:

> "First, Barringer's argument that there are no 'aggrieved parties' or any 'actual damages or loss' within the meaning of the statute ignores the fact that the special condition of probation imposed by the court plainly intended that no restitution be made until civil litigation is concluded. A judgment in the civil litigation in favor of Barringer's former employ-

> er will establish this employer as an aggrieved party and will also establish the amount of actual damages or loss. In the event of a judgment in favor of Barringer, the trust is to be terminated and all assets turned over to him. These provisions are consistent with the provisions of the statute."

The trust established by the criminal court in *U.S.* v. *Barringer, supra,* was not passing judgment upon the merits of the claims of defrauded investors. This issue was to be resolved in a separate civil action. See also *United States* v. *Tiler,* 602 F.2d 30, 34 (2d Cir. 1979), (also cited by the government).

The appointment of a receiver by a criminal court, in the case at bar, represents the first time that a criminal court has undertaken to determine the claims of the creditors and the priority of distribution. Therefore, the government's contention that the restitution order in the instant case represents no departure from settled practice is without merit.

III. THE RESTITUTION ORDER CREATED AN UNFAIR DISTRIBUTION SCHEME.

The Brief of the United States contends that the spectre of an unfair distribution scheme is not present in this case because all defrauded investors are to receive restitution on a pro rata basis. This is simply not true. The creditors are arbitrarily divided into two (2) classes: 1) investors in the 1979 and 1980 Gold Tax Shelter investment schemes, and 2) other creditors. The creditors in the first class receive restitution on a pro rata basis. After they are repaid in full, other creditors may receive repayment.

The other creditors have reduced their claims to judgments amounting to more than 1.4 million dollars. Under the restitution Order the creditors of this second class will

not share in any distribution until *all* persons who had invested in the 1979 and 1980 Gold Tax Shelter Investment Program have been paid in full.

The plea bargain and establishment of the receivership were consumated behind closed doors. It is apparent that the dictates of convicted criminal, Trenton H. Parker, resulted in the distinction between classes of creditors. Accordingly, an important issue of the denial of property without due process of law is squarely before this Court.

IV. THE MANNER IN WHICH A DISTRICT COURT MAY EFFECT RESTITUTION IS AN ISSUE OF CONTINUING IMPORTANCE UNDER 18 U.S.C. 3651, NOTWITHSTANDING THE ENACTMENT OF SECTION 5 OF THE VICTIM AND WITNESS PROTECTION ACT OF 1982.

The United States maintains that the issues in this case lack continuing importance by reason of the enactment of Section 5 of the Victim and Witness Protection Act of 1982, Public Law No. 97-291, 96 stat. 1253.

The authority of a criminal court to order restitution is contained in 18 U.S.C. 3651 which provides that as part of an order of probation, the Defendant "may be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had." Section 3651 is silent upon the issue of *how* restitution may be effected.

Section 5 of the Victim and Witness Protection Act of 1982, Public Law No. 97-291, 96 stat. 1253 prescribes procedures for ordering restitution. However, the Victim and Witness Protection Act of 1982 is *also silent* upon the issue of how the restitution, *once ordered*, may be effected. The dispute involving the method of accomplishing restitution is not more appropriately considered in a case where the restitution order is entered after comply-

ing with the procedures of the Victim and Witness Protection Act of 1982, *supra*.

The issue of how restitution would be effected is not likely to be presented in any more dramatic or compelling circumstances than are found in the instant case. Large sums of money are directly involved. A dispute exists between District Courts in different circuits. Large numbers of defrauded claimants, residing in many different jurisdictions claim an entitlement to restitution. There exists a conflict between the Federal Rules of Civil Procedure governing satisfaction of civil judgments and the Federal rules of Criminal Procedure regarding restitution.

The United States asserts that there is no need for this Court to resolve questions relating to the manner of effecting restitution under the grant of authority in 18 U.S.C. Section 3651. Upon closer examination, it becomes evident that these questions demand resolution because of the conflicts presented herein and because the manner in which a restitution order may be accomplished is not addressed by the Victim and Witness Protection Act of 1982, *supra*.

This case is of continuing importance for several further reasons. The use of a receivership to effect restitution represents a merger of the Civil and Criminal justice systems. If such a merger is to be sanctioned, it is incumbent upon this Court to consider the potential ramifications to federal criminal jurisprudence which could result.

In addition, the Tenth Circuit Court of Appeals has given a broad and unprecedented construction to Rule 57(b) of the Federal Rules of Criminal Procedure. Rule 57(b) of the Federal Rules of Criminal Procedure has not

previously been interpreted as an unrestricted incorporation provision so as to provide the District Court any power or authority known to the judiciary which it deems expedient in a given circumstance.

CONCLUSION

For the above reasons, Petitioners Robert C. Herzfeld, Robert F. Brown and RFB Petroleum would again urge that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully Submitted,

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